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In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT WEINSTEIN, ET AL., PETITIONERS

v.

HOWARD E. BRADFORD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Question presented	1
Interest of the United States	2
Statement	6
Introduction and summary of argument	9
Argument:	
A prisoner's application for parole does not implicate the procedural protections of the Due Process Clause	14
A. The procedural protections of the due process clause apply only to proceedings that may result in the deprivation of an individual's "liberty" or "property"	15
B. Except to the extent that he may have a legitimate claim of entitlement grounded in the statutes, regulations or rules governing the terms of his confinement, a prisoner has no constitutionally cognizable interest in being released on parole	17
C. Respondent has no legitimate claim of entitlement to release on parole	23
Conclusion	26

CITATIONS

Cases:

Arnett v. *Kennedy*, 416 U.S. 134 ... 13, 16-17, 21

Cases—Continued: Page

Board of Regents v. *New Left Education Project*, 404 U.S. 541 7
Board of Regents v. *Roth*, 408 U.S. 564 ..... 15, 16, 19, 21, 22, 25, 26
Cafeteria & Restaurant Workers v. *McElroy*, 367 U.S. 886 22
Catalano v. *United States*, 383 F. Supp. 346 6
Childs v. *United States Board of Parole*, 511 F.2d 1270 25
Clonce v. *Richardson*, 379 F. Supp. 338 6
Farries v. *United States Board of Parole*, 484 F.2d 948 24
Gagnon v. *Scarpelli*, 411 U.S. 778 18
Gilmore v. *Lynch*, 400 F.2d 228, certiorari denied, 393 U.S. 1092 8
Goble v. *Bounds*, 281 N.C. 307, 188 S.E. 2d 347 6
Goldberg v. *Kelly*, 397 U.S. 254 22
Goss v. *Lopez*, 419 U.S. 565 21
Jackson v. *Wise*, 390 F. Supp. 19 25
Jernigan v. *State*, 10 N.C. App. 562, 179 S.E. 2d 788 6
McIntosh v. *Woodward*, 514 F.2d 95 25
Madden v. *New Jersey State Parole Board*, 438 F.2d 1189 24
Meyer v. *Nebraska*, 262 U.S. 390 19
Montanye v. *Haymes*, No. 74-520, certiorari granted, June 30, 1975 ..... 6, 18
Morrissey v. *Brewer*, 408 U.S. 471 ..... 18, 20
Mosley v. *Ashby*, 459 F.2d 477 24-25
Oklahoma Natural Gas Company v. *Russell*, 261 U.S. 290 8

Cases—Continued: Page

Perry v. *Sindermann*, 408 U.S. 593 21
Phillips v. *United States*, 312 U.S. 246 8
Price v. *Johnston*, 334 U.S. 266 17
Procunier v. *Martinez*, 416 U.S. 396 17
Richardson v. *Perales*, 402 U.S. 389 22
Sands v. *Wainwright*, 491 F.2d 417, certiorari denied *sub nom. Guajardo* v. *Estelle*, 416 U.S. 992 8
Scarpa v. *United States Board of Parole*, 477 F.2d 278, vacated as moot, 414 U.S. 809 24
Sexton v. *Wise*, 494 F.2d 1176 25
United States ex rel. Johnson v. *Chairman of New York State Board of Parole*, 500 F.2d 925, vacated as moot, 419 U.S. 1015 25
United States ex rel. Myers v. *Sielaff*, 381 F. Supp. 840 6
Wolff v. *McDonnell*, 418 U.S. 539 ..... 7, 17, 18, 20

Constitution, statutes and regulations:

United States Constitution, Fourteenth Amendment ..... *passim*
18 U.S.C. 4202 4
18 U.S.C. 4203 ..... 4, 23
28 U.S.C. 2281 7
42 U.S.C. 1983 7
North Carolina General Statutes (1974):
§ 148-58 ..... 6, 24
§ 148-60 ..... 6, 23

28 C.F.R. Part 2, 39 Fed. Reg. 45223 2

Miscellaneous: Page

Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964) 8
Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267 (1975) 12
H.R. 5727, 94th Cong., 1st Sess. 4, 5
Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803 (1961) 23
Morris, *The Future of Imprisonment* (1974) 11
S. 1109, 94th Cong., 1st Sess. 4, 5
United States Board of Parole, 1972-1973 Annual Report 2
Wilson, *Thinking About Crime* (1975) 11

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QUESTION PRESENTED

The United States will discuss the question whether a prisoner's application for parole implicates the procedural protections of the Due Process Clause.[1]

[1] Petitioners also contend that a federal court lacks jurisdiction over a prisoner's challenge to the constitutionality of state parole consideration procedures, where that challenge has not first been made in and rejected by the state's courts. We express no view on that question.

INTEREST OF THE UNITED STATES

This case involves the question whether a prisoner's application for parole, during a period of eligibility, implicates the procedural protections of the Due Process Clause. For the reasons that we discuss below, we believe that a prisoner's unilateral expectation that the Board will exercise its discretion in his favor is neither a "liberty" nor a "property" interest within the meaning of that Clause, and consequently that the responsibility for evaluating and implementing the procedures to be followed in considering applications for parole is entrusted to the provinces of the federal and state legislatures and executives. A contrary decision by this Court would affect the constitutional context in which the federal parole system operates.

1. The United States maintains an extensive parole system. In fiscal 1973, the last year for which figures are available, the United States Board of Parole made 8,672 final parole decisions concerning adult prisoners, and granted parole in 4,576, or slightly more than half, of the cases. United States Board of Parole, 1972-1973 Annual Report, p. 19.

Under the Board's regulations (28 C.F.R. Part 2, 39 Fed. Reg. 45223) a prisoner's application for parole is accorded substantial procedural protection. Application forms are provided to each prisoner eligible for parole. Although the regulations do not require a hearing on every application, we are informed by the Board that hearings are granted as a matter of course. The petitioner is given written notice of the time and place of the hearing and is entitled to be represented at the hearing by a person of his choice, who may offer a statement at the conclusion of the interview of the prisoner and provide such additional information as the examining panel may request.

The initial parole hearing is conducted by a panel of two examiners designated by the Board. The panel informs the prisoner of the decision and, if parole is denied, of the reasons therefor. The factors considered in acting on an application for parole include the prisoner's sentence, the facts relating to his offense, his prior criminal record, his personal and social history and institutional experience, changes in his motivation and behavior, and his release plans. The Board has prescribed objective guidelines indicating the customary range of time to be served before release for various combinations of these factors. If parole is denied, the prisoner is furnished in most cases with a "guideline evaluation statement," which sets forth the factors upon which the Board relied and shows the Board's evaluation of those factors in the prisoner's case.

The prisoner may appeal an adverse panel decision to the Regional Director. The prisoner may not appear at the appellate hearing, but attorneys, relatives, and other interested parties may appear at the discretion of the Director. The Regional Director's decision can be appealed to the National Appellate Board. The National Appellate Board's decision is final.

2. These parole procedures are unlikely to be directly affected by the outcome of this case. The interest of the United States in this case is more general: to defend the prerogatives of Congress and the Executive to reconsider, determine, and implement the procedures that govern consideration of applications for parole. Current statutes delegate absolute direction to the Attorney General to decide whether a prisoner shall be paroled. See 18 U.S.C. 4202 and 4203. The Board's present hearing and release guidelines and procedures were developed by the Board after a careful three-year study conducted by the National Council on Crime and Delinquency and an analysis of the results of a pilot project begun in October 1972 in one of the Board's regions. If this Court should hold that the Due Process Clause governs consideration of applications for parole, future experimentation and alteration of the same kind could be hindered or precluded. Moreover, Congress is now considering making substantial changes in the parole system. H.R. 5727, passed by the House on May 21, 1975, has been sent to the Senate Committee on the Judiciary, where hearings are scheduled for it and for S. 1109.[2] The power of Congress to

[2] H.R. 5727 would abolish the Board of Parole and create a "United States Parole Commission" independent of the Department of Justice. The bill provides that any prisoner would be eligible for parole after one-third (or ten years, whichever comes first) of his sentence, and that the prisoner "shall" be released at the earliest release date unless an examining panel determines that one or more specified reasons for denying parole exists. H.R. 5727 also provides that each inmate shall be afforded a personal hearing, at least yearly on and after his earliest release date, at which he shall be entitled to present evidence and be represented by an advocate; the Commission must make available to the prisoner any file or report used in making its decision. A record of the hearing would be kept, and the prisoner furnished a written notice "stating with particularity the grounds on which its determination" not to grant parole was based. The bill deals with numerous other matters touching on parole, including the rulemaking power of the Commission, the conditions that may be attached to parole, early release from parole, revocation of parole, administrative appeals, and so on.

S. 1109 also would create a "United States Parole Commission." Any prisoner would be eligible for parole after one-third (or fifteen years, whichever comes first) of his sentence, and "may" be released then or later, as the Commission finds appropriate. Each inmate would be afforded a hearing at least every other year on and after his earliest release date, at which he would be entitled to present evidence and be represented by an advocate. The prisoner would have reasonable but limited access to progress reports and other materials upon which the Commission might rely. A record of the hearing would be kept and the prisoner informed of the reasons for any determination denying parole or imposing unusual conditions on a grant of parole. Like H.R. 5727, S. 1109 deals with related subjects touching on parole grants and revocation.

make changes in the parole system could be substantially affected by the outcome of this case.

Moreover, many other types of decisions affecting prisoners, such as those concerning eligibility for work-release programs and furloughs, involve opportunities for prisoners to acquire some "conditional liberty" at the discretion of penal authorities. Similarly, many decisions that do not involve a temporary release from incarceration may nevertheless involve greater liberty within the institution—decisions relating to placement, security classification, and work

assignments are but a few of many examples.[3] The Court's resolution of the question presented here could have significant implications for the institutional handling of such "housekeeping" decisions.

STATEMENT

North Carolina allows each prison inmate to apply for parole upon completion of a minimum portion of his sentence (Pet. App. 12). State law commits the decision whether to grant parole to the discretion of the North Carolina Board of Paroles. See N.C. Gen. Stat. §§ 148-58, 148-60 (1974). The Board of Paroles has not bound itself by express rules or guidelines to grant parole in any particular case; it retains discretion over all applications, and no specific set of facts will entitle an individual to be paroled. See *Goble* v. *Bounds*, 281 N.C. 307, 188 S.E. 2d 347; *Jernigan* v. *State*, 10 N.C. App. 562, 179 S.E. 2d 788.

The first review of an inmate's application for parole is conducted by a professional case analyst, who studies the inmate's record and prison file and recommends a disposition. The case analyst's recommendation and the applicant's file are reviewed by the

[3] See *Montanye* v. *Haymes*, No. 74-520, certiorari granted, June 30, 1975 (institutional placement); *Catalano* v. *United States*, 383 F. Supp. 346 (D. Conn.) (security classification on initial placement); *United States ex rel. Myers* v. *Sielaff*, 381 F. Supp. 840 (E.D. Pa.) (application for discretionary furlough); *Clonce* v. *Richardson*, 379 F. Supp. 338 (W.D. Mo.) (placement in therapy program within institution).

Parole Commission; any Commissioner may set the application for a hearing before a single Commissioner. In most cases, however, parole is either granted or denied without a formal hearing. An inmate who is denied parole is furnished a reason for the action and is entitled to submit additional material to support his application. See Pet. Br. 16-17, n. 4.

Respondent is an inmate in the North Carolina state prison system who was considered for and denied parole without a formal hearing (A. 19). On March 2, 1973, respondent and Robert E. Harris, a North Carolina prisoner also denied parole, brought a class action under 42 U.S.C. 1983, asserting that the State had not used constitutionally adequate procedures in considering their parole applications; they claimed that they should have been afforded a hearing on their applications, given access to or opportunity to comment on any adverse information that was considered in denying their applications, and advised of the reasons for the denials (A. 2-16). The district court refused to certify the case as a class action and denied the individual claims for declaratory and injunctive relief (A. 17-25).[4]

[4] There is a substantial question whether this case should have been heard by a three-judge district court. The complaint (A. 2-16) sought injunctive relief against the actions of the Board of Paroles, an agency of statewide jurisdiction whose practices, which are apparently authorized by state law, apply statewide. See 28 U.S.C. 2281. Cf. *Wolff* v. *McDonnell*, 418 U.S. 539, 542, n. 1; *Board of Regents* v. *New Left Education Project*, 404 U.S. 541. The fact that those practices are

The district court held that the Due Process Clause does not apply to the consideration of applications for parole (A. 22). The court distinguished parole revocations from parole grants (*ibid.*):

> [A] parole revocation proceeding differs from a review by a parole board to determine whether an inmate should be paroled initially. In the former proceeding, the determination is whether the conditional freedom of the parolee should be terminated because of an alleged violation of the conditions of his parole. In a review to decide whether parole should be granted, the determination is whether an inmate is a suitable prospect for return to society.

A divided panel of the court of appeals reversed. The court held that prisoners have an "inchoate privilege" (Pet. App. 14) amounting to "liberty" in the prospect of being paroled and that the denial of parole without some incidents of due process constitutes a "grievous loss" (Pet. App. 14-15). The court did not state what procedural protections might be required but remanded to the district court to consider the matter in the first instance.

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not embodied in formal regulations would not appear to affect the jurisdictional question. See *Sands* v. *Wainwright*, 491 F. 2d 417, 427-429 (C.A. 5) (*en banc*), certiorari denied *sub nom. Guajardo* v. *Estelle*, 416 U.S. 992; *Gilmore* v. *Lynch*, 400 F. 2d 228 (C.A. 9), certiorari denied, 393 U.S. 1092. Cf. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290, 292. But cf. *Phillips* v. *United States*, 312 U.S. 246. See generally Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals' opinion reflects the understanding that parole release decisions are of great importance in the life of a prisoner, and the belief that it is concomitantly important that such decisions be made only after studied deliberations and hearings calculated to minimize the chance that a denial of parole will be based upon misapprehensions of fact or mistaken judgment. There is much to be said for that view, and the federal Board of Parole now provides hearings calculated to solicit the views of prisoners and to keep them informed of the standards by which decisions will be made and the reasons for the decision in their particular case.

The result reached by the court of appeals therefore may accord with "enlightened public policy." But the question here is not the wisdom of the result but rather whether the task of defining and implementing "enlightened public policy" with regard to parole proceedings is vested by the Constitution in the legislative and executive branches, or rather in the courts under the Due Process Clause. That hearings or other formal procedures may improve the comprehensiveness and accuracy of a parole board's fact-gathering and decisionmaking functions does not answer this question, for there is no abstract constitutional right to be free of procedures that entail significant risks of error. Due process rights are implicated only when a constitutionally protected interest in liberty or property is at stake.

Legislatures and administrators, as well as courts, strive to be sensitive to the needs and desires of prison inmates. Congress is considering major changes in the federal parole system (see note 2, *supra*) and, over a lengthy period of investigation and experimentation, the federal Board of Parole has devised procedures, including a personal hearing, that it believes strike a fair balance between the legitimate interests of the inmates and the needs and objectives of the institution. North Carolina has adopted different procedures, calculated to "filter out" the vast majority of cases in which a personal hearing is quite unlikely to affect the parole decision. As more is learned about the results of the procedures now in use, or as ideas concerning the role of prisons in our society evolve, still other procedures may come to appear superior to those now in use. We believe the choice of procedures is constitutionally within the province of the legislature and the executive, which have the better opportunity to study the procedures in use and evaluate their merits and demerits.

Over the past several decades, society's views with regard to penology have undergone a sweeping revolution; many experts view rehabilitation as the ultimate objective of incarceration, and the court of appeals apparently agrees with this assessment (Pet. App. 15). If that is in fact the system's objective, then perhaps the parole board should be held accountable to the prisoner for its actions, as the court of appeals thought, for it may be that this would aid the rehabilitative process.

But the court's empirical assessment of the effect of applying the Due Process Clause to parole release decisionmaking may have been mistaken; it is not inconceivable that rehabilitation is fostered if the inmate must justify his actions to corrections officials and if they have essentially discretionary authority to offer inducements and rewards for proper behavior. If the prisoner is permitted to assume the role of an advocate in an adversarial struggle to "prove" that he does not "belong" in prison, he may lose sight of the fact that the goal of the rehabilitative ideal is to impress upon him the fact that he has erred and should not repeat the transgression.

We do not know which model of the rehabilitative process is more likely to be correct; indeed, social science research is barely adequate to enable us to frame the question. The needed knowledge can be acquired, if at all, only by a painstaking process of experimentation, change, trial, and error, similar to that in which the federal Board of Parole is now engaged. What is more, perceptions of the role of imprisonment itself can be expected to change (compare Wilson, *Thinking About Crime* (1975), with Morris, *The Future of Imprisonment* (1974)) and, as these perceptions change, our ideas about the proper role of parole and the proper way to go about deciding when to grant parole may change with them.[5] Decisions on these questions are best left to

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[5] As Judge Friendly has pointed out, there is nothing either suspect or improper—except a poor choice of name—about the "inquisitorial" method of investigating cases and making

society at large and to the representatives they elect, unless the Constitution requires otherwise. We do not believe it does in this case.

A. Respondent's claim to more elaborate parole procedures rests upon the Due Process Clause of the Fourteenth Amendment. But that Clause applies only in those circumstances where governmental action threatens to deprive an individual of "liberty" or "property." Thus the evaluation of respondent's claim must begin with an inquiry into whether the denial of parole deprives respondent of a constitutionally protected liberty or property interest.

B. Denial of parole does not deprive a prisoner of liberty. He was deprived of his liberty upon conviction, sentence, and incarceration. The prisoner who applies for parole stands in no danger of losing liberty; to the contrary, liberty is what he seeks. An adverse decision will merely continue him in his constitutionally valid non-free condition.

Certainly a prisoner has an "interest" in securing his release on parole. But that interest is not constitutionally cognizable as a "liberty" interest. The loose constellation of constitutionally based values that underlies the analysis of claims of "liberty" interests in non-prisoner cases does not, by and large,

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decisions. That method, which North Carolina has adopted, may be better suited to classes of cases involving "mass justice" than is the adversarial model, involving as it does substantial quantities of person-to-person argumentation. See Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1289-1291 (1975).

pertain to persons lawfully confined. A prisoner's interests relating to release are founded not on constitutional concepts of liberty but on the statutes, regulations, and rules that govern the terms of his confinement. At least where the question relates only to release and not to conditions of confinement, a prisoner has no constitutionally protected liberty interest apart from his legitimate claims of entitlement under those statutes, regulations, and rules.

This Court's decisions make clear that a legitimate claim of entitlement warranting the procedural protections of due process exists only when the State has bound itself to take, or refrain from taking, specified actions on the basis of determinable facts. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

It is likewise clear that a legitimate claim of entitlement arises only from positive law and not from the individual's unilateral expectation.

C. Under North Carolina law, the decision whether to grant or deny parole is completely discretionary. No set of facts respondent could prove or attempt to prove would entitle him to parole. Because the decision whether to grant parole is not determined by any particular controvertible facts but instead is discretionary, respondent could under no circumstances

have a legitimate claim of entitlement to release on parole. Accordingly, respondent has no constitutionally protected liberty or property interest in being released. Respondent's only "interest" is a hope or expectation of release. But the Constitution does not require that any particular procedures be used by the State before it acts to disappoint an individual's unilateral expectations.

ARGUMENT

A PRISONER'S APPLICATION FOR PAROLE DOES NOT IMPLICATE THE PROCEDURAL PROTECTIONS OF THE DUE PROCESS CLAUSE

The court of appeals recognized that the protections of the Due Process Clause of the Fourteenth Amendment extend only to those occasions on which the government is seeking to deprive an individual of "liberty" or "property." The court also recognized "that no prisoner ever acquires a right to earlier release; at most he has a right only to be *considered* for earlier release and a *privilege*, which may be withheld, to be *granted* it" (Pet. App. 13; emphasis in original). The court further, and correctly, observed (Pet. App. 14):

> [T]here is no present liberty at stake. There is only the right to be considered for parole and the inchoate privilege of some earlier future release if the parole board, in its discretion, concludes to grant it.

But even though the court recognized that the prisoner's only right is to be considered for early release (a right of purely statutory origin), it held that the mere hope for, or unilateral expectation of, release was itself a "liberty" interest, of which the prisoner could not be "deprived" without due process of law. As we now show, the court erred in its analysis of this expectancy interest.

A. The Procedural Protections Of The Due Process Clause Apply Only To Proceedings That May Result In The Deprivation Of An Individual's "Liberty" Or "Property"

The procedural protections of the Due Process Clause do not extend generally to all situations in which governmental action or inaction may be adverse to the interests of a particular individual or group. By its terms, that Clause applies only in those circumstances where governmental action threatens to deprive an individual of "liberty" or "property."[a] Accordingly this Court, in evaluating claims of entitlement to the procedural protections of due process. has been scrupulously careful to identify the nature of the particular substantive interests at stake.

Perhaps the paradigm is *Board of Regents* v. *Roth*, 408 U.S. 564. Roth had been hired for an academic year by Wisconsin State University; the University declined to renew his contract and Roth brought suit, claiming that he was entitled to notice of charges and a hearing on the nonrenewal. The

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[a] We need not here discuss the special situation in which the governmental action threatens to deprive the individual of his life.

Court agreed with Roth that he possessed an "interest" in continued employment, in the sense that termination of employment is a "grievous loss." But that fact, the Court held, was not determinative of the due process question (408 U.S. at 570-571; emphasis in original):

> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. * * * We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

The Court then determined that Roth's interest in continued employment, *i.e.*, his desire to obtain a renewal of his contract, was neither a "liberty" nor a "property" interest, and therefore that he could be deprived of that interest without due process.

The *Roth* decision illustrates that although "grievous loss" may be a necessary prerequisite to the invocation of due process protections, it is not a sufficient one: the substantiality of an interest is not determinative of whether that interest is entitled to due process protection. Thus the fact that a prisoner's "interest" in being released on parole is concededly substantial cannot be dispositive of the due process claim in this case. To the contrary, as *Roth* further demonstrates, the evaluation of any due process claim must begin with an inquiry into whether the interest of which the individual may be deprived is a constitutionally cognizable liberty or property interest. See also *Arnett* v. *Kennedy*,

416 U.S. 134. It is to that inquiry that we now turn.

B. Except To The Extent That He May Have A Legitimate Claim Of Entitlement Grounded In The Statutes, Regulations, Or Rules Governing The Terms Of His Confinement, A Prisoner Has No Constitutionally Cognizable Interest In Being Released On Parole

It may at first blush appear paradoxical to assert that a prisoner has no constitutionally cognizable "liberty" interest in being released from confinement on parole. This is so because the most elementary form of liberty, freedom from the state's physical control of the person, is at stake in the parole decision. But the question under the Constitution is whether an adverse parole decision "deprives" the prisoner of liberty. The answer, we believe, is that it does not.

A defendant who has been convicted of a crime, sentenced to imprisonment, and confined pursuant to that sentence has, in a very basic sense, lost his "liberty" for the period of his sentence: the sentence of imprisonment lawfully places him under the physical control of the State for the period prescribed. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285. This is not necessarily to say that a prisoner retains no constitutionally cognizable liberty interests at all. Cf. *Procunier* v. *Martinez*, 416 U.S. 396. See generally *Wolff* v. *McDonnell*, 418 U.S. 539,

555-556. Cf. *Montanye* v. *Haynes*, *supra*. What we do contend here is that a prisoner, while incarcerated, has no constitutionally cognizable "liberty" interest in release from confinement prior to the expiration of his sentence, for it is specifically that interest of which he has been constitutionally deprived by his conviction and sentence.

The prisoner is "deprived" of nothing further by the decision denying parole. The prisoner who applies for parole stands in no danger of losing liberty; he is, to the contrary, seeking liberty. An adverse decision merely continues the prisoner in his non-free condition; it does not worsen that condition. This, we believe, fully distinguishes the denial of parole from its revocation. At a parole revocation proceeding, the parolee attempts to defend his liberty, albeit conditional, against those who would take it from him; an adverse determination ends the parolee's freedom and thus "deprives" him of "liberty" within the meaning of the Due Process Clause. *Morrissey* v. *Brewer*, 408 U.S. 471, 480-482. See also *Gagnon* v. *Scarpelli*, 411 U.S. 778. A prisoner seeking parole has no similar constitutionally protected "liberty" interest in the parole board's decision; he is not at liberty, he has no constitutional liberty interest (at least in the form of release from prison), and he does not stand to lose any liberty as a result of that decision.

This Court's decision in *Wolff* v. *McDonnell*, *supra*, is not to the contrary. The question in *Wolff* was whether the protections of due process extend to

prison disciplinary proceedings that may result in the reduction of a prisoner's statutory good-time credits. This Court held that the protections of due process do apply to such proceedings. But the Court's decision did not turn upon the mere fact that a reduction in good-time credits might affect the timing of the prisoner's release, *i.e.*, it did not turn upon a simple identification of release from prison with constitutionally protected liberty. Instead, the Court focused narrowly on the nature and source of the prisoner's interest in the retention of his accumulated good-time credits. Since that interest was created by statute, and by statute could be extinguished only "[i]n cases of flagrant or serious misconduct" (418 U.S. at 546), the Court determined that "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated" (418 U.S. at 557).

This approach, which would appear necessarily applicable here as well, avoids reference to or reliance upon the loose constellation of constitutionally based values that underlie the analysis of claims of "liberty" interests in non-prisoner cases. See, *e.g.*, *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 572; *Meyer* v. *Nebraska*, 262 U.S. 390, 399. The Court's analysis in *Wolff* implicitly recognizes that such values do not, in the main, pertain to persons lawfully confined. A prisoner's interests relating to re-

lease are founded not in constitutional concepts of liberty but in the statutes, regulations, and rules that govern the terms of his confinement. In other words, a prisoner has no constitutionally protected interest in release from confinement, except to the extent that those statutes, regulations, and rules create a positive right to release.

Accordingly, although a prisoner's interests in release from confinement may for purposes of convenience be called "liberty" interests, as in *Wolff*, they are in fact nothing more than "property" interests in disguise, *i.e.*, entitlements created by nonconstitutional sources of positive law.[7] As the decision in *Wolff* indicates, a prisoner's interests relating to release must be analyzed in "property" terms; the question in each case must be whether the State has extended to the prisoner a claim of entitlement that warrants procedural protection against unlawful divestment.

In short, our position here is that, whatever the scope of Fourteenth Amendment "liberty" interests in other contexts, a prisoner's interest relating to release from confinement, to be constitutionally entitled to the procedural protections of due process, must

[7] Indeed, this may also be true with respect to a parolee's interest in retaining his freedom. In *Morrissey* v. *Brewer*, *supra*, a case that purportedly turned upon the parolee's "liberty" interest, the right of which the parolee would be deprived by wrongful revocation was in fact a statutorily-created "property" interest, *i.e.*, the entitlement to remain at large unless and until it was demonstrated that he had violated the terms of his parole.

rest upon a legitimate claim of entitlement grounded in the statutes, regulations or rules governing the terms of his confinement. Thus the analysis to be applied here must be similar to that employed by this Court in recent decisions involving the assertion of property interests.

Those decisions make clear that a constitutionally cognizable property interest arises only when the condition limiting the Executive's freedom of action exists in positive law and not merely in the hopes or expectations of the individual. This Court in *Roth* explicitly rejected the argument that such a property interest could arise merely from the individual's need, desire, or expectation (408 U.S. at 577):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

A legitimate claim of entitlement exists only when the state has bound itself, either by statute, regulation, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts. So, for example, in *Goss v. Lopez*, 419 U.S. 565, the student had a statutory right to attend school unless he was guilty of misconduct; in *Arnett* v. *Kennedy*, *supra*, the employee could be terminated only for cause; in *Perry* v. *Sindermann*, 408 U.S. 593, the teacher asserted a well-settled practice of reemployment absent "sufficient

cause." See also *Goldberg* v. *Kelly*, 397 U.S. 254. Where the State has bound itself to extend or confer a benefit, or withhold a sanction, upon the determination of a particular set of facts, the Due Process Clause requires the implementation of procedures designed to ensure that the determination of those facts will be made fairly and accurately. Cf. *Richardson* v. *Perales*, 402 U.S. 389, 401-402.

On the other hand, where the State has not so bound itself, there can be no legitimate claim of entitlement. In *Board of Regents* v. *Roth*, for example, the University had discretion not to reemploy the teacher, and no set of facts he could prove would entitle him to reemployment. See also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886. When there is no determinable set of facts that could give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protections of due process are not implicated. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

We turn, therefore, to an application of these principles to the facts of this case.

C. Respondent Has No Legitimate Claim Of Entitlement To Release On Parole

North Carolina law provides the Board of Paroles with discretion to grant or deny parole; the parole decision is to be made not on the basis of any objective facts, but on the basis of the predictions the Board may be able to make about the prisoner's ability to live peacefully in the larger society. N.C. Gen. Stat. § 148-60. See also 18 U.S.C. 4203. The decision to grant or deny parole is a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 813 (1961). No particular fact or set of facts is determinative, nor could it be, for although facts are surely important to the parole release decision, the ultimate question involves an assessment of the prisoner's character. There is no fact or set of facts that a prisoner can prove that will establish his entitlement to have the Board place trust in his character. In short, no set of facts that respondent could prove or attempt to prove would entitle him to parole. Because the decision whether to grant parole is not determined by any particular controvertible facts, but instead is entrusted to the discretion of the Board, respondent has no liberty or property interest in being released on parole.

We do not argue that no constitutionally protected interest is involved in the parole process. Under

North Carolina law, respondent has a legitimate claim of entitlement to be considered for parole. North Carolina "guarantee[s] to every prisoner a review and consideration of his case upon its merits." N.C. Gen. Stat. § 148-58. The State may not withdraw or deprive a prisoner of that right without due process. But respondent does not contend that he (or members of his class) has been denied consideration for parole. Moreover, the fact that respondent was entitled to consideration does not, standing alone, entitle him to any particular procedures upon consideration. Neither statute, regulation, rule, nor course of practice establishes any more elaborate procedures upon consideration than respondent's case was accorded. Respondent therefore has no entitlement apart from the Due Process Clause to more elaborate procedures. And since the grant of parole upon consideration is a discretionary decision not turning upon provable facts, the Due Process Clause itself does not apply.[8]

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[8] The majority of the courts of appeals to consider the question have agreed that the Due Process Clause does not apply to applications for parole, at least in the absence of a statute or regulation creating an entitlement to parole subject to defeasance only upon certain facts. See *Scarpa* v. *United States Board of Parole*, 477 F. 2d 278 (C.A. 5) (*en banc*), vacated as moot, 414 U.S. 809; *Farries* v. *United States Board of Parole*, 484 F. 2d 948 (C.A. 7); *Mosley* v. *Ashby*, 459 F. 2d 477 (C.A. 3); *Madden* v. *New Jersey State Parole Board*, 438 F. 2d 1189 (C.A. 3).

Two courts of appeals (in addition to the court below) have held that the expectation of parole release is a "conditional liberty" that cannot be denied without procedural protections. *Childs* v. *United States Board of Parole*, 511 F. 2d 1270 (C.A.D.C.); *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole*, 500 F. 2d 925 (C.A. 2), vacated as moot, 419 U.S. 1015.

A closely related question is whether the setting of a tentative parole release date establishes a "liberty" interest so that hearings are required before the date can be altered. Compare *Sexton* v. *Wise*, 494 F. 2d 1176 (C.A. 5) (no liberty interest until actual release date) and *McIntosh* v. *Woodward*, 514 F. 2d 95 (C.A. 5) (same), with *Jackson* v. *Wise*, 390 F. Supp. 19 (C.D. Cal.) (setting of tentative release date creates a liberty interest).

We do not quarrel with the court of appeals' observation that prisoners may experience a "grievous loss" upon being denied parole. But the loss in question stems not from the deprivation of an entitlement, but rather from the disappointment of an expectation. The loss results not because the State's actions were unauthorized, but merely because those actions did not meet the "unilateral expectations" respondent had self-generated. As the *Roth* decision teaches, such a loss does not amount to the deprivation of a constitutionally protected interest: the Constitution does not require that any particular procedures be used by the State before it acts to disappoint an individual's unilateral expectations.[9]

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[9] Indeed, in the last analysis this case is indistinguishable from *Roth*. Respondent's argument, at bottom, appears to be: "Prisoners have a right to be considered for parole. If my application for parole had been granted, I would have acquired a constitutionally protected interest in remaining at liberty, for under statute I could not be reimprisoned without due cause. Therefore I have a constitutionally protected interest in the possibility of receiving parole, and the parole board must comply with the requirements of due process before it

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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denies my application." This argument appears identical to the one rejected in *Roth*. The teacher's argument there was: "Teachers have a right to be considered for employment in the next academic year. If my contract had been renewed, I would have had a constitutionally protected interest in my employment, because under the contract I could not be fired without due cause. Therefore I have a constitutionally protected interest in the possibility of renewal, and the university must comply with the requirements of due process before it decides not to renew my contract." The weakness in those arguments lies in the "therefore." The liberty or property interest arises only when the contract is renewed, only when the prisoner is granted parole. It does not arise before. The "therefore," which relates to the period before the protected interest arises, is merely a verbal bridge lacking any logical foundation.

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